ing the maxim, *quod contra rationem juris receptum est non est producendum ad consequentia.*

This case is so entirely peculiar in its character, that if we take our statute of wills as the general rule for such dispositions, as we are bound to do, and treat cases of *donationes mortis causa* as exceptions which are not to be extended by way of analogy, then we are clear of all embarrassment as to the principle on which the case is to be decided. It is not pretended that any gift like this has ever been held good, and it may be safely declared that no mere gift made in prospect of death, and professing to pass all one's property to another, to take effect after death, can be valid under our statute of wills, no matter what delivery may have accompanied it. If this is not true, then it is plain that the statute of wills, so far as it is intended to exclude all modes of disposing of personal property at death, which it does not provide for, is repealed by the decisions of the courts

It is not necessary to point out the danger of sustaining such a donation as this, for no thinking mind can fail to see it; and it was this very consideration which led to the precautions which are provided in the statute on the subject of nuncupative wills. We cannot even glance at these precautions, without seeing that they were designed to defeat a gift sustained by such evidence as was given in this case, and to prevent oral dispositions, in the nature of last wills, from being made under such suspicious circumstances. The court ought to have instructed the jury that such evidence could not establish a *donatio mortis causa*, or to have ruled out the whole evidence *as insufficient.*

Judgment reversed and new trial awarded.[1]

New York Supreme Court, Albany, February 18, 1852.

JOHN COSTIGAN *v.* JOHN NEWLAND.

Where an agent rightfully receives money for his principal, which ought to be paid over by the principal to a third person, such third person cannot maintain an

[1] See ante, page 1; and for a new point on the subject of this case, see Moore *v.* Darton, 7 Eng. L. & E. Rep. 134.

action against the agent for the recovery, though the agent have never in fact paid it over to his principal, and though the agent have notice of the claim made by such third person.

An attorney who forecloses a mortgage for his client by advertisement under the statute of New York, and on the sale receives the amounts only which he pays over, the amount due to his client, cannot be held liable to the person having the oldest lien on the surplus. The action in such case must be brought against the client, and not against the attorney.

The defendant, as attorney for Lockwood Deforest, foreclosed a mortgage against John and Andrew Delahant, by advertisement. After paying the mortgage debt and interest and costs out of the money arising from the sale, a surplus remained in the hands of the defendant, amounting to $180 95. The plaintiff claimed such surplus by reason of a judgment he had recovered against the Delahants for over $2,000, which was the oldest unpaid lien on the premises, proved on the trial; and while such surplus remained in defendant's hands, plaintiff served notice on the defendant of his claim, and the facts on which it was based, and demanded the money. The defendant refused to pay, but afterwards paid the money over to one Harrison, who claimed to be entitled to it, and executed a bond of indemnity to the defendant.

The cause was referred to a referee, who reported in favor of the defendant, and the plaintiff appealed.

S. Stevens, for Plaintiff.

J. K. Porter, for Defendant.

PARKER, P. J.—The defendant received the money as the attorney of Deforest, for whom he transacted the business of foreclosing the mortgage. He is therefore to be considered as the agent, and Deforest the principal, and the question presented is whether, conceding that the plaintiff was entitled to the surplus, the action, under such circumstances, can be maintained against the agent.

If the agent had a right to receive the money, and it was not paid over by mistake, then payment to the agent "was in law *eo instanti*, payment to the principal. (1 Campbell, 337,) and in such cases the principal, and not the agent, is accountable for the money. In *Eden* v. *Read*, (3 Campbell, 139,) it appeared that Spooner and Atwood were Bankers and Receivers General of taxes. The

plaintiff was a collector of taxes, and brought a suit against Read their clerk, on a receipt signed "for Spooner & Atwood, Wm. Read." It was held by Lord Ellenborough that the action should have been brought against Read; and the plaintiff was nonsuited.

The case of *Stephens* v. *Badcock*, (3 Barn. & Ald. 354, 23 Eng. Com. Law, 93,) is directly in point. The plaintiff was Rector of Ludgrave; the defendant had been clerk to Samuel John, an attorney whom the plaintiff had for several years employed to receive his rents and tithes. John, being in embarrassed circumstances, left home and never returned. After his departure and before the cause of it was known in his office, the defendant received from one of the plaintiff's parishioners (which he was in fact authorized to do) the sum of £9, and gave a receipt as follows:

"Rec'd 20 Aug., 1827, of Mr. H. F. £9, for half a year's composition for tithes, due to Rev. J. Stevens at Lady day last past.

For Mr. S. John,

John Badcock."

At the time of this transaction, John was indebted to plaintiff on a balance of account. It did not appear that John owed the defendant. The defendant refusing to pay plaintiff the £9, assumpsit was brought, and the King's bench held the action would not lie, for the reason that the defendant received the money as the clerk of his master, and was accountable to him for it; the master, on the other hand, being answerable to the client for the sum received by the clerk. This case cannot be distinguished in principal from that under consideration. Both present the question whether a mere agent, not acting in any official capacity, while he acts within the scope of his authority, can be held liable, by any other person than his principal, for money properly received by him in the name and business of, and for the principal.

The recent case of *Colvin* v. *Holbrook*, (2 Comst. 126) recognizes this same principal, and must be regarded as settling the law in this State. It was a suit brought against a Deputy Sheriff, to recover money rightfully received by him in that character, on a redemption of lands he had sold on execution, and which he refused on demand, to pay over to the person to whom it belonged. The

only question was whether the action would be against the Deputy Sheriff; and judgment was given against the plaintiff, on the ground that the action in such case would only lie against the Sheriff. The court laid out of view the official character of the defendant, and put the case on the ground most favorable to the plaintiff, deciding only the question, whether an agent receiving money from his principal in pursuance of a valid authority, without fraud, duress or mistake, is liable to an action in behalf of a person who is ultimately entitled to the money, for neglecting to pay the same over upon request, and before it is paid over to the principal. The Court said the rule is universal, that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred on him, and they held the principal alone responsible.

The cases relied on by the plaintiff's counsel in this case, were there examined and commented on by Gardner, J., and shown to be cases where the principal had no right to receive the money, and of course could confer none upon the agent; or where it was paid by mistake; or where the agent exceeded his authority and consequently could not claim its protection.

There is no doubt that where money is paid to the agent by mistake, or under such circumstances, that it may be recovered back from the principal by the party paying, it may be recovered back from the agent if he has not paid it to the principal, or altered his situation in relation to him, (7 Cowen, 460.) But where it is properly paid to the agent, the party ultimately entitled can recover only from the principal. In other words, where the party claims the money in affirmance of the right of the agent to receive it for his principal, he can sue only the principal and not the agent for the money. No case has been cited, and I think none can be found conflicting with this rule.

The defendant in this case owed no duty to the plaintiff. The money was properly received by the defendant, and it was his duty to pay it to Deforest, his principal. A judgment against the defendant in this suit would not protect him against another judgment in favor of Deforest. As to third persons, Deforest is re-

garded as having received the money by his agent when it was paid to the defendant, and was chargeable with the money and with the legal consequences of receiving it, as soon as it came to the hands of his attorney, whether the attorney ever paid it over to his principal or not. It may be that Deforest has some legal defence to the action. It is certain that he is better acquainted than another person with the state of his accounts with the plaintiff.

The defendant had no individuality in the matter. It was merged in that of the principal. The defendant could not interplead the claimants. (*Cooper* v. *Tastet*, 1 Tamlyn, 177, 5 Madd. Ch. R. 47, Story Eq. Pl. sec. 296. He could neither decide the matter for his principal, nor ask the Court to decide it for him.

The referee was therefore right in his report, and the judgment entered therein must be affirmed.

Judgment of referee affirmed.

Court of Common Pleas of Philadelphia County, August, 1852.

M'GLENSEY VS. COX.

1. The purchaser of the interest of one of several partners has no right to interfere personally in the affairs of the partnership, and a refusal of the remaining partners to permit him to do so will not entitle him to the interference of a Court of Equity by injunction, or the appointment of a receiver.
2. A provision in partnership articles that neither of the partners should sell or assign his interest without consulting the other parties, and giving them the preference, does not by implication authorize the introduction of a stranger into the firm by one of the partners, on a refusal by the rest to purchase his share.

This was a motion for an injunction and receiver upon bill filed. The facts sufficiently appear in the opinion of the Court.

THOMPSON, P. J.—The bill filed in this case alleges that Andrew B. Hirst, Charles D. Cox and James B. Smith entered into partnership for the purpose of carrying on the business of the City Hotel, on the 29th day of January, 1852; that the said Hirst on the 16th of July, 1852, having first offered to sell his share or interest in the partnership to his co-partners, upon